No. 75-1603

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

CLARENCE M. DITLOW, *et al.*,
Petitioners,

v.

PAN AMERICAN WORLD AIRWAYS, INC., NORTHWEST AIRLINES, INC., TRANS WORLD AIRLINES, INC., AMERICAN AIRLINES, INC., JAPAN AIRLINES, QANTAS AIRWAYS, PHILIPPINE AIR LINES, CHINA AIRLINES, BRITISH AIRWAYS, AND AIR NEW ZEALAND, LIMITED,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

QUESTION PRESENTED

Whether an action for damages under section 1 of the Sherman Act, 15 U.S.C. § 1, alleging an unlawful agreement by air carriers in the setting of fares, can be maintained where (a) the fares in question were set forth in, and charged pursuant to, effective tariffs law-

fully on file with the Civil Aeronautics Board, and (b) where the activities in issue were under the continuing regulatory control and supervision of the CAB.

STATEMENT OF THE CASE

During the relevant period, the respondent air carriers (hereinafter "the carriers") were members of the International Air Transport Association (hereinafter "IATA").[1] One of IATA's principal functions is to provide a stable mechanism for ratemaking in international air transportation. The IATA ratemaking machinery has been approved by the CAB since 1946. *See IATA Traffic Conference Resolution*, 6 CAB 639 (1946).

In March 1973, the carriers attended an IATA meeting in London for the purpose of negotiations with respect to the fares to be charged in the transpacific market following the expiration of the then current agreement, which was to expire on March 31, 1973. For reasons not pertinent here, the carriers adopted "interim" fare agreements to take effect April 1, 1973, and to expire on April 30, 1973, and "permarent" agreements to take effect May 1, 1973, and to continue in effect for approximately a year.

The interim agreements increased the then existing fares by 5 percent in order to avoid revenue losses due to fluctuations in the values of international currencies. The permanent agreements contained a number of changes in the transpacific fare structure, the net effect of which was to increase the base fares in the transpacific market by approximately 4 percent, and, in addition, a 5-percent currency fluctuation increase.

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[1] The facts stated herein are taken from the parties' joint stipulation of facts (Pet. App., pp. 13-21).

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On March 29, 1973, as required by section 412 of the Federal Aviation Act, 49 U.S.C. § 1382, the carriers filed both the interim agrements and the permanent agreements with the CAB for approval. The carriers also filed tariffs with the CAB, for effectiveness on April 1, setting forth the 5-percent fare increase resulting from the interim agreements. These tariffs were not required to, and did not, contain expiration dates.

On March 30, 1973, the CAB approved the interim agreements. On April 1, 1973, the carriers began charging fares for transpacific travel in accordance with the new tariffs.

The CAB did not act on the permanent agreements by May 1, 1973, the date when they were to have become effective, and, in fact, did not act until mid-July. The delay was due to the fact that the CAB directed the carriers to file economic justifications for the agreements and permitted interested parties to file comments.

Thus, as of May 1, there was no effective IATA agreement on transpacific fares, and the carriers, awaiting CAB action, had the choice of leaving the existing tariffs in effect or of filing new tariffs containing different fares. No carrier filed a new tariff, with the result that each carrier's then current tariff (*i.e.*, the tariffs which became effective April 1) remained in effect during the period in issue in this case. Although empowered to do so, the CAB took no action to suspend those tariffs during the period in issue, or to require the carriers to file new tariffs.

On July 12, 1973, the CAB finally acted on the permanent agreements. It approved the proposed fare increases for the South Pacific, but withheld approval with respect to the North/Central Pacific. The carriers then filed new tariffs reflecting the CAB's decision.

During the post-May 1 period in issue in this case, the carriers charged fares for transpacific travel in accordance with the tariffs which became effective on April 1.

PROCEEDINGS BELOW

The complaint (Pet. App., p. 1) alleges (1) that on and after May 1, 1973, the carriers implemented an unlawful agreement to set fares in the transpacific market in violation of section 1 of the Sherman Act, and (2) that on and after May 1, 1973, the carriers charged fares for travel in the transpacific market in excess of the fares contained in then currently effective tariffs, in violation of section 403(b) of the Federal Aviation Act, 49 U.S.C. § 1373(b). The only relief sought by the complaint is damages, measured by the 5-percent difference between the pre-April 1 fares and the fares which were charged during the period in issue.[2]

Pursuant to the carriers' motion, the district court, on August 7, 1973, dismissed the complaint for failure to state a claim upon which relief could be granted (Pet. App., p. 9).

The petitioner appealed. The case was fully briefed, and was argued before the United States Court of Appeals for the District of Columbia Circuit. On September 19, 1974, the court of appeals entered a judgment vacating the dismissal and remanding the case to the district court with instructions to retain jurisdiction and direct the parties to seek the determination of the CAB with respect to what the court stated was the "first critical, and perhaps dispositive issue" in the case: "What fares over the Pacific, those ceasing 31 March 1973 or those to be effective through 30 April, 1973, if

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[2] Although this action is styled as a class action, petitioner did not file a motion in the district court for certification of a class action under Rule 23 of the Federal Rules of Civil Procedure.

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any, were in effect during May 1973?" (Pet. App., p. 10).

Following the remand, the parties filed pleadings with the CAB, and requested that it issue a declaratory order. By order dated March 6, 1975, the CAB held that the fares which became effective on April 1, 1973, remained effective throughout May 1973, and throughout the entire period in issue in this case (Pet. App., p. 22).

On the basis of the CAB's determination of the critical tariff issue in their favor, the carriers filed a supplemental motion to dismiss the complaint. Since matters outside the pleadings had been presented, the district court ruled that the motion would be treated as a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, and the parties were permitted to supplement the record as appropriate under that Rule. The parties then filed a joint stipulation of facts for purposes of the carriers' motion only (Pet. App., p. 13). By order dated May 29, 1975, the court granted the carriers' motion and dismissed the complaint (Pet. App., p. 29).

Petitioner appealed to the court of appeals once again. On January 6, 1976, the court of appeals summarily affirmed the district court's decision (Pet. App., p. 31). On February 3, 1976, the court denied petitioner's request for rehearing (Pet. App., p. 32).

REASONS FOR DENYING THE WRIT

A. This Case Arose Out Of a Situation Which Is Not Likely To Recur, And A Decision By This Court Would Be Of Little Or No Precedential Value

This case arose out of a totally unexpected and temporary delay in the regulatory process pursuant to which international air fares are normally established. Such a situation is not likely to recur. If the CAB had acted

on the permanent agreements by May 1, 1973, the date on which they were to have become effective, there would have been no opportunity to call into question whether the April 1 tariffs were proper and effective after May 1, since new tariffs implementing the Board's decision would have been filed immediately. Furthermore, the likelihood of recurrence is made even more remote by the fact that the CAB now routinely requires that tariffs filed in implementation of IATA agreements contain expiration dates coinciding with the expiration dates of the agreements. *See* Stipulation ¶ 13, Pet. App., p. 18. Thus, a decision by the Court in this case would be of little or no precedential value.

Moreover, as developed in the remainder of this brief, the decision of the court of appeals is correct.

B. Since The Fare Charged Petitioner Was Set Forth In Effective Tariffs On File With The CAB, This Action Is Barred By The *Keogh* Doctrine

The CAB has specifically held that the carriers' April 1 tariffs (on which petitioner's fare was based) were the effective tariffs in the transpacific market from April 1 through mid-July. The CAB rejected petitioner's argument in its entirety. Thus, the carriers were required to charge fares in accordance with the April 1 tariffs on and after May 1. If they had not, they would have violated section 403(b). This disposes of petitioner's overcharge claim.

The Board's determination that the April 1 tariffs were effective throughout the relevant period also resolves the antitrust claim. This case falls squarely within the long-established doctrine of *Keogh* v. *Chicago & N.W. Ry. Co.*, 260 U.S. 156. Since the fares in question were specified in, and charged pursuant to, effective tariffs on file with the CAB, the *Keogh* doctrine does not permit an action for damages.

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In *Keogh*, the plaintiff, a shipper, alleged that certain ICC-regulated railroads had formed an association "to secure agreement in respect to freight rates among the constituent railroad companies, which would otherwise be competing carriers." 260 U.S. at 160. The complaint alleged further that the rates established by the association were unreasonable and higher than those theretofore charged. The plaintiff sought to recover antitrust damages measured by the difference between the rates set by the alleged agreement and the rates previously charged, "which, but for the conspiracy, would have remained in effect." *Id.*

The Court held that, even accepting the allegations of the complaint as true, it did not "follow that Keogh, a private shipper, may recover damages under § 7 because he lost the benefit of rates still lower, which, but for the conspiracy, he would have enjoyed." *Id.* at 162. The Court made it plain that the effective tariff must control, saying (260 U.S. at 163)—

> Section 7 of the Anti-Trust Act gives a right of action to one who has been "injured in his business or property." Injury implies violation of a legal right. The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier.

As the CAB has found, the fares charged the petitioner here, and the purported class, were those set forth in lawfully filed and effective tariffs. In the words of the Court in *Keogh*, "unless and until suspended or set aside" those fares were, "for all purposes, the legal rate[s], as between carrier" and passenger.

The *Keogh* case was applied by this Court in *Georgia* v. *Pennsylvania Ry. Co.*, 324 U.S. 439, in terms which

are directly applicable here. The Court there said (324 U.S. at 453): "We think it is clear from the *Keogh* case alone that Georgia may not recover damages even if the conspiracy alleged were shown to exist." And it went on to say that *Keogh* held (*id.*)—

> that for purposes of a suit for damages a rate was not necessarily illegal because it was the result of a conspiracy in restraint of trade. The legal rights of a shipper against a carrier in respect to a rate are to be measured by the published tariff. That rate until suspended or set aside was for all purposes the legal rate as between shipper and carrier and may not be varied or enlarged either by the contract or tort of the carrier.

This language is directly applicable to the situation in this case.[3]

In the *Keogh* opinion, the Court went on to discuss further the matters on which the petitioner relies here. In this portion of its opinion, the Court referred to the impossibility of proof of damages where rates are subject to the approval of a regulatory agency. It should be pointed out that these additional considerations[4] do not in any way impair the basic holding of the Court in *Keogh* (and in *Georgia*) that the legal rights of the parties "are measured by the published tariff." 260 U.S. at 163.

The petitioner contends that there is no problem of proof of damages in this case such as there was in

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[3] *Keogh* and *Georgia* have been followed by the lower courts. *See, e.g., Lamb Enterprises, Inc.* v. *Toledo Blade Co.*, 461 F.2d 506 (6th Cir. 1972), *cert. denied*, 409 U.S. 1001; *S.S.W., Inc.* v. *Air Transport Ass'n of America*, 191 F.2d 658 (D.C. Cir. 1951), *cert. denied*, 343 U.S. 955.

[4] In *Hanover Shoe Co.* v. *United Shoe Mach. Corp.*, 392 U.S. 481, 491, n.8, the Court referred to these additional arguments as "dictum".

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Keogh, and asserts that "In the present case, the old fares [those in effect through March 31, 1973] serve as the basis for measuring damages." Pet., p. 15. In support of this contention, the petitioner points out that, after the CAB disapproved the permanent agreements with respect to the North/Central Pacific area, the carriers refiled tariffs at the pre-April 1 level. There is no dispute as to any of this. But the question whether, as of May 1, 1973, the CAB would have approved fares lower than those contained in the April 1 tariffs, remains purely hypothetical and speculative.

We know that the Board, through its failure to exercise its power of suspension, accepted the continued use of the April 1 tariffs on and after May 1. Perhaps the Board would have accepted a lower fare level, and perhaps not. It is entirely possible, for example, that the filing of lower fares would have precipitated complaints from charter airlines which would have led to the suspension of the fares. The point is that no one, including the CAB, can at this point in time look back to May 1, 1973, and determine the totally subjective question whether the CAB would at that time have accepted tariffs that were never filed.

C. The Events In Question Were Under The Continuing Supervision Of The CAB, Thus Preempting The Operation Of The Antitrust Laws

The petitioner appears to take the position that there can be no antitrust immunity with respect to air carrier activities unless those activities have been approved by the CAB under section 412 of the Federal Aviation Act. This argument fails to recognize that the statutory scheme of the Federal Aviation Act creates implicit antitrust immunity in certain instances. Such implicit antitrust immunity is illustrated by the Court's decision in *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296, and *Hughes Tool Co.* v. *Trans World*

Airlines, Inc., 409 U.S. 363. In those cases, the Court held that where carrier activities are under the continuing scrutiny of the CAB, and where the CAB has the power to investigate and bring to a halt any unfair practices, the CAB's jurisdiction preempts the operation of the antitrust laws. This principle of preemption is not tied to section 414 of the Federal Aviation Act, 49 U.S.C. § 1384, which grants specific antitrust immunity to agreements approved by the CAB. Rather, it arises by implication from the statutory scheme. Thus, in *Hughes Tool*, the Court stated that "a statutory scheme that does not create a total exception from the antitrust laws may, nonetheless, in particular and discreet instances by implication grant immunity from an antitrust claim." 409 U.S. at 385, n. 14.

The activities of the carriers which petitioner challenges in this action were under constant and close CAB scrutiny throughout the period in issue. The CAB was clearly aware of the filing of both the interim and permanent agreements, and it was also aware that the carriers' April 1 tariffs remained in effect on and after May 1. The CAB could easily have intervened at any time if it had believed that unreasonable fares were being charged or that the carriers were engaged in any unfair practices. In short, the CAB was in command of the entire situation. Thus, with respect to the actions here in question the operation of the antitrust laws was preempted by the regulatory scheme of the Federal Aviation Act.

The *Keogh* doctrine and the preemption rule are neither harsh nor unjust. They recognize that in a regulated industry questions as to the reasonableness of fares, as well as other matters, must of necessity be left to the regulatory process and the agency charged with its administration. Had the CAB believed that the carriers' tariffs contained rates which were unjust or unreason-

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able during the period in question, it could have suspended them. The CAB did not suspend the tariffs, however, and petitioner cannot complain.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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